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IN THE

Supreme Court of The United States

October Term, 1963

No. 880

FRANK E. AIPLE, doing business as AIPLE TOWING COMPANY,

Petitioner,

v.

CENTRAL SOYA COMPANY, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Frank E. Aiple, doing business as Aiple Towing Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on December 4, 1963.

Citation to Opinion Below.

The opinion of the Court of Appeals for the Seventh Circuit, reprinted in Appendix A hereto, is reported in 325 F. 2d 129.

Jurisdiction.

The judgment of the court below was entered on December 4, 1963 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

A tugboat crew member was injured, when, in the course of his duties, he was walking on the top of a barge at night to remove the running lights and fell into the hold of the barge through a gaping hole left because a hatch cover was broken off when the barge was delivered for tow. On these facts, the following questions are presented:

1. Whether a barge is unseaworthy when it is delivered for tow with a hatch cover broken off, leaving a gaping hole where tug crewmen perform duties at night.

2. Whether delivery of a barge for tow in that condition breaches the express warranty of the towage contract that the barge is "properly equipped and supplied, and in all other respects fit and suitable to be towed."

3. Whether the express indemnity clause in the towage contract is valid and imposes liability on respondent in petitioner's favor.

4. Whether the express indemnity clause in the towage contract can be defeated by a lack of negligence on the part of the indemnitor.

STATEMENT.

Virgil Crass, a seaman employed on petitioner's tug Manitou, was injured when, in the course of his duties, he fell into the gaping hole resulting from a missing hatch cover on a barge (AD 160) which was being towed by Aiple under a written contract with the barge owner, Central Soya Company, Inc. (respondent). The barge had been delivered for towage with the hatch cover missing. It had been lying broken in the bottom of the barge for at least five days before delivery to petitioner.

Crass sued the tug and Aiple alleging negligence and unseaworthiness. Aiple answered the libel and, by petition under Admiralty Rule 56, brought in Central Soya, alleging that if Aiple is held liable to Crass then Central Soya is liable over to Aiple by virtue of the written contract of towage. Central Soya, in accordance with the admiralty practice, answered Crass' libel and Aiple's petition.

After a trial without a jury, the District Court entered judgment against Aiple in favor of Crass for $60,000. The court also found that Crass was not entitled to judgment against Central Soya and that Aiple was not entitled to recover over against Central Soya.

Aiple satisfied the $60,000.00 judgment and appealed. The Seventh Circuit affirmed (325 F. 2d 129) on the grounds that 1) the barge was not unseaworthy even though Crass in the performance of his duties had fallen into the gaping hole which existed because of the missing hatch cover; 2) there was no unseaworthiness or breach of warranty upon which either Crass or Aiple could recover from Central Soya; 3) Central Soya was not negligent; and 4) this lack of negligence defeated petitioner's right to indemnity under the indemnification clause of the towage contract (Appendix A, p. 8). One judge dissented (pp. 8-9).

The facts are:

Petitioner Aiple owned the tug Manitou operating on the Mississippi River (App. 8, 9, 12)[1] and entered into a written contract with respondent Central Soya to tow its barges (Aiple's Exhibit No. 2, App. 159; 9, 12).

The contract in part provided that Central Soya

> "warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed"

and that Aiple is not "obligated to inspect any tow" (App. 159; Aiple's Exhibit No. 2).

Barges are often picked up "on the fly" without stopping (App. 72, 73). It was not the custom or practice of Aiple to check the barges when they were picked up; the crew relied on the fact that the barges were supposed to be in good condition (App. 69, 98-99, 120) and on the above contract provision.

The contract of towage also contained an indemnity provision in Aiple's favor (App. 159, Aiple's Exhibit No. 2).

Central Soya had a reciprocal contract with Aiple containing identical provisions (App. 72; Aiple's Exhibit No. 3, App. 160-162). The charge for towing an empty barge such as the one here involved (over 196 feet long) was only 55 cents per mile (App. 72, 147).

Barge AD 160 was delivered to the tow of the Manitou in the early, dark hours of the morning, with the stern, starboard hatch cover missing (App. 47, 56-57, 64, 86, 132, 138-139). Libelant's Exhibit No. 22 (App. 158) shows the four by eight foot hole created by the missing hatch cover

[1] References are to the Appellant's Appendix, certified by the Court of Appeals as part of the record.

(App. 47). Another view of the hole appears in Libelant's Exhibit No. 20 (App. 156). After the accident, the missing hatch cover was found to be lying in the bottom of the barge hold below the hole, with its hinges broken (App. 49, 50, 149, 151). The crew of the Manitou had nothing to do with the breaking; this had taken place before the barge was delivered to Aiple (App. 149, 151). Libelant's Exhibit No. 21 is a photograph of the cover in the bottom of the hold, taken from above through the opening (App. 157).[2]

This was not a case of towing a barge with an open hatch where the hatch doors or covers were available and could be closed. Here, the cover, lying in the bottom, was too heavy to lift by hand (Aiple's Exhibit No. 4, App. 163). The necessary repairs required welding which was done at the dock; the Manitou did not have such equipment (App. 83, 84, 85, 87, 88, 89). Central Soya paid the bill for repairing the defect (App. 84, 76).

The tow consisted of three barges pushed upstream by the tug Manitou—barge AD 160 and one other being at the head of the tow (App. 25, 51, 52, 92-93, 114, 115, 137).

When traveling at night, running lights are required at the head of the tow (App. 50). The wires to these lights are put out by walking across the top middle of the cargo box of the barge and stringing them along (App. 52, 53).[3] This was Aiple's custom (App. 53). This was the manner in which the wires were strung on barge AD 160 (App. 65-66). The wires could not be strung without getting up

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[2] Aiple's Exhibit No. 4 (App. 163)—an inspection report on barge AD 160 made to Central Soya by the tug Tully (not owned by Aiple) which had had the barge in tow prior to the tow by the Manitou (App. 75-76, 85)—shows that the hatch cover was already lying in the hold on February 16, 1961, seven days before the accident to the libelant Crass and five days before the barge's delivery to petitioner.

[3] Libelant's Exhibit No. 11A shows the cargo box, its slanted roof and the hatch covers on Barge AD 160 (App. 155).

on the top of the barges because they were too long to be flipped up from the deck (App. 54).

It is readily apparent to everyone that to string the wires along the edge of the barge which had no railing protection would create a very serious hazard of tripping crew members who might walk along the narrow walkways. (The dissenting judge recognized this when he said "The presence of comparatively narrow walkways along the side of the barge with a missing hatch cover did not make the barge 'properly equipped' " (Appendix A, p. 8).)

When a barge is to be dropped, the running lights and the wires to them must be removed. This cannot be done by pulling the wires the length of the cargo box because they will snag on the handles and hinges (App. 54-55). Instead, the crew member must coil the first few feet around his arm, climb on to the top at the stern and walk the length of the barge coiling the wire (App. 54). This procedure of walking over the top of the barges coiling the wire was petitioner's custom in removing the wires (App. 134, 55, 58-59). The crew also walked across their tops in making up a tow (App. 39).

On the occasion here in question, Crass was ordered to remove the running lights in order to drop barge AD 160 at Louisiana, Missouri (App. 56). It was after midnight on a dark, rainy night (App. 92, 103, 40, 44, 46). After coiling the wire around his arm, he stepped up on to the top of the cargo box at the starboard stern corner and started diagonally forward toward the center of the top, coiling the wire (App. 57, 58, 59, 62). After only a step or two he stepped off into space where the hatch cover was missing, fell into the hold and suffered injuries (App. 59-60). He did not know the hatch cover was missing (App. 56-57).

Reasons for Granting the Writ.

The decision of the court below is wrong; it is squarely in conflict with decisions of other circuits and with decisions of this Court. Unless review is granted and this decision reversed, it will stand as a precedent unjustly to bar recovery by injured seamen.

1. The finding of the court below that a barge, delivered for towage with a gaping hole because a hatch cover has been broken off, is not unseaworthy is in clear conflict with the decisions of other circuits.

Shenker v. *United States*, 322 F. 2d 622 (CA2, 1963), held that a piece of dunnage lying on a hatch and over which Shenker tripped rendered the ship unseaworthy because in walking on the hatch the employees (stevedores) were giving it an intended use "because they were following customary practice" that was "foreseeable as a likely one by the owner and was consonant with a shipboard procedure recognized as permissible" (p. 626). Walking across the top of the hatch here was Aiple's customary practice and its followed procedure in putting up and taking down running lights. In *Shenker*, a petition for certiorari was denied by this Court February 17, 1964 (*American Stevedores, Inc.* v. *Shenker*, No. 634).

The court below erroneously distinguished this case.

Tedeschi v. *Luckenbach Steamship Company*, 324 F. 2d 628 (CA 2, 1963), (citing the *Shenker* case) held that an uncovered batten well around a hatch made the ship unseaworthy. The well there held to create a hazardous condition was about $3\frac{1}{4}$" wide and $3\frac{1}{4}$" deep running completely around the hatch. Here, the gaping hole was 4 by 8 feet.

United States v. *Tug Manzanillo*, 310 F. 2d 220 (CA9, 1962), held that the use of an unsecured hatch cover upon

which the crew member stepped rendered the ship unseaworthy; and *Grillea v. United States*, 232 F. 2d 919 (CA2, 1956), that the use of a wrong hatch cover likewise rendered the ship unseaworthy. The court below erroneously found that there was no conflict with these decisions (Appendix A, pp. 6-7). It mistakenly relied on *Anderson* v. *Scully*, 31 F. 161 (D.C. S.D. N.Y., 1887), and *Adams* v. *The Barge UBL 118*, 154 F. Supp. 612 (D.C. E.D. La., 1957) (Appendix A., pp. 7-8). In *Anderson* the injured party was not walking across the hatch cover in order to perform his duties, but was a stranger using that part of the scow as a passageway. In *Adams* the court found that the injured party's climbing on the hatch cover was unnecessary. The evidence here is directly to the contrary—the hatch covers had to be crossed in putting up and taking down the running lights.

2. The decision of the court below also is in direct conflict with the decisions of this Court holding the following items unseaworthy: loose beans spilled on the dock from broken and defective bags (*Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206 (1963)); temporary presence on the ship's rail of slime and fish gurry (*Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960)); defective wooden plank in a pallet (*Reed* v. *The Yaka*, 373 U.S. 410 (1963)); defective metal bands around cargo (*A & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962)); breaking of a shackle on a boom (*Guzman* v. *Pichirilo*, 369 U.S. 698 (1962)); a broken boom (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946)); a defective rope (*Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944)).[4]

Gutierrez, 373 U.S. 206 (1963), stated that the proper application of the seaworthy doctrine (p. 213)

[4] These defects are not as glaringly dangerous as a gaping hole in the deck where crew members must work.

> "... is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used...."

Certainly, a barge to be towed and delivered is not reasonably fit for this purpose when a hatch cover is missing, thus rendering it extremely dangerous when the necessary and required running lights must be removed at night in order to complete the tow and delivery. These facts are uncontroverted.

3. It is clear that a barge delivered for towage with a hatch cover lying broken in the hold, leaving exposed an 8 by 4 foot hole, breaches the express warranty provision of the contract that the barge is "properly equipped and supplied and in all other respects fit and suitable to be towed". That warranty is something more and broader than the warranty of seaworthiness. The dissenting judge in the court below correctly so found (Appendix A, pp. 8-9).

Certainly that breach carried with it liability for the damages which naturally and foreseeably flow from that breach (*Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U.S. 563 (1958)).

It was clearly foreseeable that some member of the crew in accordance with the practice and custom of walking across the tops of barges to put out and take in running lights might fall through this gaping hole and suffer injury.

4. The contract of towage contained an express indemnity clause. The court below held that Central Soya's (respondent's) lack of negligence defeated Aiple's (petitioner's) right of recovery under that clause (Appendix A,

p. 8). Such a holding makes indemnity in an admiralty case depend solely upon the negligence or lack of negligence of the indemnitor, even though this Court has said that there "is a complete divorcement of unseaworthiness liability from concepts of negligence" (*Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, at 550 (1960)). A case directly concerned with indemnity and the lack of negligence of the indemnitor was argued January 8, 1964, before this Court and is now awaiting decision (No. 82, *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Company*).

The statement of the court below (Appendix A., p. 8) that the express indemnity clause does not apply to Central Soya because it "would not otherwise be liable" is clearly mistaken. It overlooks the fact that Central Soya was "otherwise liable" to Crass either because it delivered an unseaworthy barge or because it breached its express warranty that the barge was "properly equipped and supplied, and in all respects fit and suitable to be towed."

5. By its holding that negligence defeated recovery under the indemnity provision, the court below avoided the necessity of passing upon respondent's claim that *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955), *Boston Metals Co.* v. *The Winding Gulf*, 349 U.S. 122 (1955) and *Dixilyn Drilling Corp.* v. *Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963) rendered invalid the indemnity provision as an attempt by Aiple to contract against liability for its own negligence. It is petitioner's position that the provisions of the indemnity paragraph here relied on do not come within *Bisso* and its progeny; but that if they do, then *Bisso* should be reconsidered because, as Mr. Justice Harlan stated, concurring in *Dixilyn* (p. 698), "it was wrongly decided."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. RUSH
JOHN M. O'CONNOR, JR.
Counsel for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

December 4, 1963

Before Duffy, Knoch and Castle, *Circuit Judges*.

Castle, *Circuit Judge*. Virgil Hayden Crass, the libelant, brought suit against the towboat Manitou and his employer, Aiple Towing Company,[1] respondents, for personal injuries suffered while libelant was working as a crew member of the towboat. Crass fell through an open hatch into the hold of an empty grain barge which was being towed under a contract between Aiple and the barge owner, Central Soya Company, Inc.[2] Crass alleged that his injuries were caused by the negligence of Aiple and the unseaworthiness of the Manitou and the barge. Aiple, by petition under Admiralty Rule 56, brought Central Soya Company, Inc. into the suit, alleging that if Aiple is held liable to Crass then Central Soya is liable over to Aiple by virtue of the written contract of towage.

The District Court, following a trial without a jury, made and filed findings of fact and conclusions of law, and entered judgment against Aiple in favor of Crass for $60,000. The judgment order also found that Crass was not entitled to judgment against Central Soya and that Aiple was not entitled to recover against Central Soya. Aiple satisfied the money judgment and appealed from those parts of the judgment which ordered that Crass was not entitled to judgment against Central Soya and Aiple

[1] Frank E. Aiple doing business as Aiple Towing Company. Referred to herein as Aiple.

[2] Hereinafter referred to as Central Soya.

was not entitled to recover over against Central Soya, appellee.

Aiple contends the District Court erred in failing to enforce in favor of Aiple and Crass and against Central Soya, the barge owner, the specific warranty and indemnity provisions of the towage contract between Aiple and Central Soya. Those warranty and indemnity provisions are as follows: Central Soya

> ". . . warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed, and AIPLE TOWING COMPANY shall not be obligated to inspect any tow and/or the storage of any cargo therein or thereon, but such inspection if made, shall not affect the warranties of Owner [Central Soya] as herein expressed. . . ."
>
> " . . . Owner [Central Soya] agrees to indemnify AIPLE TOWING COMPANY and any towing craft and the owners, charterers, operators and/or underwriters of such craft and hold such parties and craft harmless against all claims for any loss of or damage to or expense incurred in connection with the tow and/or its cargo, including without limitation, claims for recoupment or by way of liability over in mutual fault collision cases wherein the towing craft will be involved, and from any liability to or on account of the crew or personnel, or any loss of or damage to personal effects of said crew or personnel, howsoever arising, provided, however, that nothing herein contained shall be construed as rendering owner or the tow and/or its cargo, if any, liable for any loss of, damage to, or expense in connection with the property of AIPLE TOWING COMPANY or any third party or for loss of life or personal injury for which Owner [Central Soya] or the tow, and/or its cargo, if any, would not otherwise be liable."

The record discloses that Aiple's tug or towboat, the Manitou, operated on the Mississippi River. In the early, dark hours of the morning of February 21, 1961, barge

AD 160, owned by Central Soya, was picked up by the Manitou with other barges for the purpose of towing it from St. Louis to Louisiana, Missouri. The tow, with the Manitou pushing, consisted of three Aiple barges. Barge AD 160, with another barge abreast, was at the head of the tow—being pushed upstream.

The cargo box of the AD 160 was 196 feet long, 37½ feet wide and 11 feet deep, not including the height of the top. The top or roof was shaped in an inverted "V" at about a 45 degree angle, sloping up from the edges. Along each side of the top were openings covered by six sets of doors or hatch covers. Each set covered an opening. The doors or covers were hinged at the side. They were on an incline from the deck, running from three feet to six feet at the highest point. Running the length of each side of the barge was a gunwale or walkway.

Running lights at the head of the tow were required for night travel. Such lights had been strung across the bows of the two barges. The lights received their current from the Manitou through wires running the length of the barges and joined by electrical plug connections between the barges, and between the Manitou and the barge immediately in front of it. To drop off a head barge, it is necessary to remove the running lights and the wire running the length of that barge.

When the Manitou picked up barge AD 160 the stern, starboard hatch cover or door was missing. After the accident it was found lying in the bottom of the barge below the opening. Its hinges were broken. The absence of the cover or door left a four by eight foot opening. One of Aiple's mates had observed that the cover was missing. Crass and some of the other crew members had passed within two feet of the open hatch on numerous occasions during the two days the Manitou had been towing the barge. The barge itself was unmanned and there is no showing

that Central Soya, its owner, had any knowledge of the missing hatch cover prior to the accident.

It was after midnight, on a dark, rainy night, when the tow approached Louisiana, Missouri, where barge AD 160 was to be dropped. Crass was ordered by the mate to remove the running lights. After unplugging the connection at the stern of AD 160, he commenced coiling the wire around his arm, "crawled on top of the timberhead first and then went onto the top of the barge". He started diagonally across the roof of the cargo box, coiling wire as he went. He had taken only a step or two when he stepped off into space where the hatch cover or door was missing and fell about sixteen feet into the hold, injuring himself.

The trial court found that the injuries to Crass were caused by negligence of Aiple and contributory negligence of Crass, that barge AD 160 was seaworthy and that Central Soya was not negligent.

Aiple contends that (1) the delivery of the barge to it for towing with a missing hatch cover was a breach of Central Soya's contractual warranty that the barge was "seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed" and such breach rendered Central Soya liable to Aiple for the judgment Crass recovered from Aiple resulting from his fall through the open hatch. Further, that Crass should have been permitted to recover directly from Central Soya, because not only was the barge unseaworthy but, in addition, the above warranty ran to Crass as a third-party beneficiary; and (2) Central Soya is liable over to Aiple under the express indemnity provision of the contract.

The District Court specifically found, among other things, that it was not unusual for empty grain barges on the Mississippi to ride with hatch covers open or en-

tirely removed; the purpose of hatch covers being to protect cargo from weather. It further found that Central Soya could not have reasonably anticipated the hatch covers would be used as work areas.

In reviewing the judgment of the trial court, sitting without a jury in Admiralty, we may not redetermine findings of fact unless we find them to be clearly erroneous. *McAllister* v. *United States*, 348 U.S. 19; *Bloomquist* v. *T. J. McCarthy Steamship Company*, 7 Cir., 263 F. 2d 590, 593. The findings here are supported by substantial evidence in the record. And we perceive no basis in the record for a finding or conclusion that the barge was not "properly equipped and supplied, and in all other respects fit and suitable to be towed". At the bow and stern there were work areas about eight feet in width and on each side of the barge there was a three foot gunwale or walkway running the full length of the barge. That it was the custom of Aiple's crew, known and approved by the master, to walk on and across hatch covers of barges to string or remove running lights does not make it either a proper practice or one foreseeable on the part of Central Soya—albeit it made the task easier.

Seaworthiness and compliance with the warranty are to be determined by the standard of whether the barge and its appurtenances were "reasonably fit for the purpose for which they are to be used." *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 213.

The hatch covers which are here involved were neither intended for use as work areas nor located in a work area. This distinguishes the case from *Shenker* v. *United States*, 2. Cir., 322 F. 2d 622; *United States* v. *Tug Manzanillo*, 9 Cir., 310 F. 2d 220 and *Grillea* v. *United States*, 2 Cir., 232 F. 2d 919, relied upon by appellant. In *Shenker* a piece of dunnage had been left lying on a covered and battened down deck hatch of a naval vessel. A timekeeper for a

stevedoring contractor boarded the vessel to ascertain when the stevedores who were working aboard the ship would quit work for the day. He walked forward along the starboard side of the main deck until he saw the stevedores' foreman walking along the portside. He called to the foreman who waved and beckoned to him. Both men mounted the hatch and met near its center. In leaving the hatch the timekeeper unexpectedly stubbed his toe against a plank which had been left lying on the hatch and fell to the deck, about forty inches below, and was injured. The district court specifically found that in walking on the hatch the foreman and timekeeper were giving it an intended use because they "were following a customary practice" that was "foreseeable as a likely one by the owner and was consonant with a shipboard procedure recognized as permissible." In affirming a judgment awarding damages to the timekeeper the Second Circuit said: "The holding that the [vessel] was unseaworthy, which in any event appellants do not appear to challenge, was therefore entirely proper". The nature of the vessel, type and location of the hatch involved, as well as the factual finding of customary permissible practice and lack of challenge to the finding of unseaworthiness serve to distinguish *Shenker* from the instant case. Here an empty grain barge is involved—a type of vessel shown by the record to be commonly towed with hatch covers opened or removed—and there is substantial evidence supporting the District Court's findings that, despite the practice of Aiple's crewmen (which, however, was unknown to the barge's owner or to Central Soya) "it was not [the hatch covers'] purpose to be used as a work area" and Central Soya "could not have reasonably anticipated the hatch covers would be used as work areas". On the facts of this record those findings are not clearly erroneous—in fact or in law. In *Manzanilla* the cover of a small hatch on the tug's deck had become unsecured and the master

of the vessel being towed was injured when he stepped on the hatch cover and it capsized, dropping him into the hold. In *Grillea* the wrong hatch cover had been placed over the "pad-eye" and it gave way when a longshoreman stepped on it. The cover had become part of the platform across which the workmen were to walk in order to place another cover in the prosecution of their work. Appellant's reliance on such cases is misplaced. The facts here make the rationale of *Anderson* v. *Scully* (D. C. S. D. N. Y., 1887), 31 Fed. 161 and *Adams* v. *The Barge UBL 118* (D. C. E. D. La., 1957), 154 F. Supp. 612 applicable. In *Anderson* the captain of a canal boat fell through an open hatch cover of a scow when he climbed up the roof-shaped sloping hatches to the opposite side where one hatch cover was not in place. The court pointed out (p. 162):

> "The deck furnished a safe and easy passage in this case. It was the natural and proper passage. The roof formed by the hatch covers was not designed as a passage-way."

And; in *The UBL 118* it is said (pp. 613 and 614):

> "Barge UBL 118 was a hopper barge equipped with a coaming varying from three to four feet in height which completely encircled a single hatch. Sliding hatch covers resting on the coaming rose to a low peak approximately one foot higher at the vessel's centerline. Between the coaming and the vessel's sides and ends there was an unobstructed walkway measuring between two and three feet on the port and starboard sides and seven feet at bow and stern. By accident two covers had been dropped overboard . . . leaving a large opening at the forward end of the hatch. The barge was light and hatch covers were not needed.
>
> . . . . . .
>
> Libelant [a crewman of the towboat who fell into the hold through the open hatch while placing lanterns] . . . was careless and negligent in climbing or walking

> on the covers or coaming, . . . the condition or sea-worthiness of the barge or tug had no bearing on his accident. Both vessels were, however, entirely sea-worthy for purposes of this voyage."

The use of an appurtenance of a vessel for a purpose other than that for which it was intended cannot form the basis for a conclusion that the vessel is unseaworthy. There was no error in the District Court's conclusion that there was no unseaworthiness or breach of warranty upon which either Crass or Aiple could predicate a right to recovery from Central Soya.

The finding that Central Soya was not negligent is amply supported. And it defeats any recovery by Aiple under the indemnification provision of the towage contract. The provision by its express terms excludes indemnification for injury to any third party—such as an employee of Aiple—for which Central Soya "would not otherwise be liable."

The judgment order of the District Court is affirmed.

AFFIRMED.

DUFFY, *Circuit Judge*, dissenting.

It is my view that Central Soya's delivery of the barge with a missing hatch cover breached Central Soya's separate warranty that the barge was "properly equipped and supplied and in all other respects fit and suitable to be towed." This is something more and broader than a warranty of sea-worthiness.

The presence of comparatively narrow walkways along side of the barge with a missing hatch cover, did not make the barge "properly equipped." I think the evidence showed it was Aiple's accepted custom and practice for members of the crew to walk across the tops of barges to put out and take in running lights.

The large gaping hole caused by the missing hatch cover was a menace to the tugboat crew, and a breach of the express warranty that the barge was "properly equipped and supplied and in all other respects fit and suitable to be towed." The District Court judgment that Aiple could not recover from Central Soya was, in my view, clearly erroneous.

APPENDIX B

JUDGMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, December 4, 1963

Before

Hon. F. RYAN DUFFY, Circuit Judge

Hon. WM G. KNOCH, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

VIRGIL HAYDEN CRASS, *Libelant*,

v.

THE M/V MANITOU, her engines, boilers, etc., and AIPLE TOWING COMPANY,

Respondents and

CENTRAL SOYA COMPANY, INC.,

Third Party Respondent.

FRANK E. AIPLE, doing business as Aiple Towing Company,

Appellant;

No. 14198

v.

CENTRAL SOYA COMPANY, INC.,

Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 880

FRANK E. AIPLE, DOING BUSINESS AS AIPLE TOWING COMPANY,

Petitioner,

vs.

CENTRAL SOYA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

STUART B. BRADLEY,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 880.

FRANK E. AIPLE, DOING BUSINESS AS AIPLE TOWING COMPANY,

Petitioner,

vs.

CENTRAL SOYA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

The Respondent opposes the petition for a Writ of Certiorari because the decisions of the Court of Appeals and of the District Court were correct; because the only questions involved are whether or not the fact findings of the trial court were correct or clearly erroneous; because the decision fully conforms to the opinions of this Court, is not in conflict with decisions of other circuits; and finally because no question of law is involved.

OPINIONS BELOW

The decision of the District Court consists of the findings of fact and conclusions of law, pages 29 to 34 of Appellant's Appendix. The opinion of the Court of Appeals for the Seventh Circuit, affirming the trial court is reprinted

in Petitioner's Appendix "A" and is reported in 325 F. 2d 129.

QUESTION PRESENTED.

The only actual question involved and offered for review by the Petition for Certiorari is whether the findings of fact made by the trial court were clearly erroneous.

STATEMENT

Virgil Crass sued Petitioner, his employer, in Admiralty for personal injuries suffered while working as a crew member of the pusher type towboat "MANITOU." He alleged that his injuries were caused by negligence of the owner of the towboat, its agents, officers, and employees in several respects, including failure to act with due care, insufficient lighting, inadequate working force, improper supervision and unseaworthiness of the towboat and its tow (App. 3). At the time of the accident the tow consisted of three river barges, one of which was Barge AD 160, unmanned, without motive power and owned by Respondent Central Soya, who had employed Petitioner to move the barge as an independent contract tower. The barge had been towed to a landing a few miles below St. Louis and docked on that stage of its voyage by another independent contract tower. At this landing it was taken into a larger tow by Petitioner's towboat "MANITOU." When this taken in tow one of the cargo hatch cover doors was missing, although this fact was not known to the Respondent Central Soya (Appellee's Appendix 19). At St. Louis the Petitioner's towboat left some of the barges of a more numerous tow, rearranged the three remaining barges and proceeded on up the Mississippi River pushing the three barges, including the AD 160 (App. 25, 92, 113).

Before the accident occurred Petitioner's towboat had been towing (pushing) Barge AD 160 for two days and two nights, during which time the fact that the cover was missing was obvious. One of petitioner's mates admitted he had observed that the cover was missing (Finding 9,

App. 31) (App. 132, 133). Virgil Crass and some other crew members had passed within two feet of the open hatch on numerous occasions in daylight (Findings 11, App. 31). Although the hatches are at a higher level than the line decks and gunwales where the crew work the sloping hatches are readily visible. The Respondent Central Soya had no employees traveling with the tow and did not have knowledge that the hatch cover was missing from its unmanned Barge AD 160. The trial court found that the injuries suffered by Virgil Crass from falling into the open hatch were caused by the negligence of Petitioner and contributory negligence of Virgil Crass; that Barge AD 160 was seaworthy and fit for the intended purpose, properly equipped, and fit to be towed and that Appellee Central Soya was not negligent. (Findings 15, 16, 22; App. 32, 33).

Virgil Crass recovered a judgment of $60,000.00 against Petitioner, his employer, which has been paid, so that there now remains only the question whether the respondent (Barge owner) who had complied with its contract that the barge be seaworthy and otherwise fit to be towed, should indemnify the Petitioner (tower) whose failure to perform towage in a workmanlike manner and whose negligence was the proximate cause of the accident.

ARGUMENT AND FURTHER STATEMENTS OF FACT.

As already stated, the only actual question presented to this Court by the Petition for Certiorari is whether the findings of fact made by the trial court were clearly erroneous. One of the three judges who reviewed the case in the Court of Appeals thought so, calling the missing hatch cover "a gaping hole;" a term which is enthusiastically used at least six times in the petition.

Virgil Crass did indeed fall through the "gaping hole," but this was not in a work area, was clearly visible and had been gaping at Petitioner for more than two days and nights while Petitioner was towing the barge. In order to fall into this opening Virgil Crass had to climb up from the work area of the deck onto the sloping hatch covers which by their very construction were not intended to be used as work areas. The Respondent owned the towed barge but did not know that the hatch was open. The trial court found that the sole proximate cause of the accident was the joint negligence of Petitioner and Virgil Crass himself, that the barge was in fact seaworthy and fit to be towed.

The Petitioner seeks indemnity, but the evidence and the findings of fact definitely preclude it. The language of the towing contract that the barge should be "properly equipped and supplied and in all other respects fit and suitable to be towed" was complied with and both the trial court and Court of Appeals so decided. As the Court of Appeals stated "*The hatch covers here involved were neither intended for use as work areas nor located in a work area.*" Towboats may push a flotilla of anywhere from three to thirty or more barges at one time and it is customary for some or all of the empty grain barges to

be towed with hatch covers open, or partly open or entirely removed. Hatch covers on barges are quite different from open decks or from hatches on the decks of ocean going vessels, or lakers or navy vessels, which in some instances have been found by the triers of fact to be work areas. In the case at bar the undisputed evidence showed, that the trial court found that it was not unusual for empty grain barges, such as AD 160, to be taken in tow with hatch covers open or entirely removed, the purpose of hatch covers being to protect cargo from weather (Finding 3, App. 30, App. 134), that Respondent Central Soya could not have reasonably anticipated that hatch covers would be used as work areas (Finding 20, App. 33), which was not their purpose (Finding 6, App. 31). The trial court found further that personnel of a towboat customarily inspect towed barges to determine if there were defects or damage, that Petitioner did not follow the custom of inspecting the tow, and allowed and encouraged its crew to walk on hatch covers to string running lights (Findings 5, 6, App. 30, 31, and see Appellee's Appendix). The trial court found that Petitioner was negligent in failing to maintain an adequate inspection of its tow, directing and permitting the crew to use hatch covers for a purpose for which they were not intended (Finding 15, App. 32).

The reasons listed by Petitioner for granting the writ are all spurious.

1. The seaman did in fact recover in the case at bar. The question was not whether he could or could not recover but *who* was responsible under the facts of the case. The principle that equipment must be safe and suitable for its intended use is not abrogated or affected by this decision but has been clearly recognized. The teaching of *Mitchell v. Trawler Racer*, 362 U. S. 539, 550; 80 S. Ct. 961 (1960) is that a vessel owner is not obligated to furnish an accident free ship but to furnish a vessel and appurtenances reasonably fit for their intended use. That was done

in the case at bar and both the trial court and Court of Appeals so decided.

2. The cases cited by Petitioner as being in conflict with the case at bar all involved work areas, are clearly distinguishable and were distinguished on their facts by the Court of Appeals. For example, Petitioner cites *Shenker v. United States*, 322 F. 2d 622 (C. A. 2, 1963), and would have this Court believe that all structures called "hatches," no matter where placed or on what kind of floating craft are the same. Deck hatches on the seagoing naval vessel in the *Shenker* case are entirely different from the covers of grain barges such as AD 160 in the case at bar. In the *Shenker* case there was a finding of fact that walking on those hatches was consonant with shipboard procedure, which finding the Court of Appeals did not disturb, although expressing some doubts about the fact finding of unseaworthiness. In the case at bar the court found that Barge AD 160 was provided with unobstructed walkways and work areas and that the absence of the hatch cover did not render the barge unseaworthy (App. 33, Finding 22), that such hatch covers are not work areas (App. 32, Finding 15) and that respondent "could not have reasonably anticipated that the hatch covers would be used as work areas." Petitioner who had knowledge and control of the operation was at fault for directing and permitting the crew to use such covers for a purpose for which they were not intended (Finding 15).

3. The barge was in fact fit and suitable to be towed; reasonably fit for its intended use, and both the trial court and Court of Appeals so decided, contrary to what Petitioner asserts in its argument. Here again we have only a question of fact supported by uncontradicted testimony in the record.

4. Contrary to what has been stated in the petition the case at bar does not turn on validity or invalidity of indemnity clauses; rather the whole towing contract includ-

ing the indemnity clause was inapplicable to personal injuries of Petitioner's employees. Paragraph 5 of the contract was as follows:

> "provided, however, that nothing herein contained shall be construed as rendering owner or the tow and/or its cargo, if any, liable for any loss of, damage to, or expense in connection with the property of Aiple Towing Company or any third party or for loss of life or personal injury for which Owner or the tow and/or its cargo, if any would not otherwise be liable."

The trial court found as a matter of fact that the Respondent was not "otherwise liable" and the Court of Appeals affirmed. (See Findings 21, 22; App. 33.) That puts an end to the Petitioner's argument even if its strained construction of the towing contract were to be adopted. Furthermore, this is not a longshoring contract where a stevedore contractor is in charge of the work, has control of the operations, is charged with the duty to supervise and liable under a warranty of workmanlike service. Petitioner cites *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Company, Inc.*, No. 82, which was decided by this Court on March 9, 1964. In that case there had been a finding that equipment supplied by the contractor (Indemnitor) was defective "and unfit for its intended use," that the contractor was in control of the operations and that "liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury." Absence of negligence in supplying the equipment that was not fit for its intended purpose did not prevent the contractor from being liable under the particular language of the indemnity contract in that case. That decision is not in any way applicable to the actual decision in the case at bar. Here in our case the barge *was* fit for its intended purpose, it was not the Respondent but Petitioner who failed to take preventive measures and was best (in fact solely) situated to take them.

The decisions upholding certain indemnity clauses of

stevedoring contracts are clearly inapplicable as already explained because of the facts of the case at bar. They are also inapplicable because in the case at bar the contract was to tow a vessel, in which situation exculpatory and indemnity provisions are invalid under *Bisso v. Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629 (1955) and *Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co.*, 372 U. S. 697, 83 S. Ct. 967 (1963). In mentioning these towing cases we wish to make clear that whether *Bisso* was or was not wrongly decided (as implied by Petitioner) makes no difference to the case at bar because under the facts here indemnity is inapplicable regardless of the nature of the service performed by Petitioner.

If the hatch cover had been at work areas and *if* the shipowner had been held liable by the trier of fact on principles of unseaworthiness, and *if* the indemnity language had in fact been applicable, then and only then would the question of validity of indemnity clauses and exculpatory provisions of towing contracts become relevant. But all the ifs are *facts* that were decided against the Petitioner and are all clearly proved in the record in favor of Respondent. The Petitioner builds an ingenious house of cards as though the three *ifs* had been decided in his favor. But they were not, and there comes a time when the rehashing of these fact questions should end. That time has passed and there is no valid reason for this case being again reviewed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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v.

CENTRAL SOYA COMPANY, INC.,

Respondent.

REPLY BRIEF FOR PETITIONER

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Respondent.

REPLY BRIEF FOR PETITIONER

Far from demonstrating that the decision below is correct, we believe respondent's brief highlights the errors in that decision and proves the necessity for review and reversal by this Court.

I.

Petitioner contends that a barge delivered for towage with a hatch cover broken off, as this barge was, is manifestly unseaworthy as a matter of law under the decisions of this Court and of other Circuits. To now argue, as respondent does, that the decision below is correct because it held the barge seaworthy and thus no reviewable issue exists is only to beg the very question the petition raises.

The distinctions that respondent (and the Seventh Circuit) attempt to make between this case and the cases cited and relied upon in our petition are distinctions with

out a difference. Respondent's main distinction that the missing hatch cover was not in a "work area" is spurious because, in this case, the crew members *were* required, in order to string out and take in the running lights, to walk at night across the tops of the barges directly in the path of the missing hatch cover. To say that it was perfectly proper for the hatch cover to be missing because respondent did not foresee that crew members might come near it in the course of their nightly duties is but another attempt to convert the doctrine of seaworthiness into an ordinary negligence concept. This Court has consistently rejected all such attempts.

Nor will the fact that the seaman actually recovered in this case (because petitioner paid his claim) prevent the decision below from standing as a precedent to prevent recovery by seamen in future cases where it is contended that conditions like the missing hatch cover here do not render a vessel unseaworthy.

II.

Since the filing of the petition for certiorari in this case, the Court, on March 9, 1964, decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, 32 Law Week 4181. We submit that both the decision and the reasoning in that case require reversal here. Despite respondent's attempt to distinguish stevedoring from towage cases, the principles involved are precisely the same.

In the *Oregon Stevedoring* case, this Court held, contrary to the decision of the Seventh Circuit in this case, that the lack of negligence of an indemnitor does not defeat the right to indemnity. There an implied warranty was involved. Indemnity is *a fortiori* required here, where the warranty was an express one.

Moreover, and signally, this Court declared in the *Oregon Stevedoring* case that the burden of compensating injured

seamen is to be placed ultimately upon the person whose default caused the injury (at 32 Law Week, pages 4183-4184):

> "Where the shipowner is liable to the employees of the stevedoring company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. See *Alaska S. S. Co.* v. *Petterson*, 347 U.S. 396, 401 (dissenting opinion).
>
> "Both sides press upon us their interpretation of the law in regard to the scope of warranties in nonsales contracts, such as contracts of bailment and service agreements. But we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, *American Stevedores, Inc.* v. *Porello*, *supra*, in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. **By placing the burden ultimately on the company whose default caused the injury**, *Reed* v. *The Yaka*, 373 U.S. 410, 414, we think our decision today is in furtherance of these objectives." (Emphasis supplied)

This language is precisely applicable here: the loss should ultimately be borne by respondent, because its default in supplying a barge with a missing hatch cover was the cause of the injury. Moreover, petitioner was in no position to repair or correct the defect.

Respondent and petitioner had identical reciprocal towing contracts. Sometimes petitioner towed respondent's barges and sometimes respondent towed petitioner's. These contracts both provided:

"(4) Owner warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed, and [the tower] shall not be obligated to inspect any tow and or the stowage of any cargo therein or thereon, but such inspection if made, shall not affect the warranties of Owner as herein expressed." (App. 159, 161)

These clauses, together with the indemnity provision and the fact that 196 foot barges when empty are towed for only 55 cents a mile, all show the clear intent of the parties to place "the burden ultimately on the company whose default caused the injury." 32 *Law Week* at p. 4184.

Further, the indemnity clause of the contract *does* apply to respondent. It was "otherwise liable" on either or both of two grounds—the delivered barge *was* unseaworthy or its condition breached the broader express contract warranty that it was "properly equipped and supplied, and in all respects fit and suitable to be towed." Respondent totally fails to answer this.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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